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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1984

UNITED STATES OF AMERICA,
Respondent,

v.

WILLIAM J. FARRAH,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG
George N. Bashara, Jr.
Kathleen McCree Lewis*
Madelyn C. Law
Attorneys for Petitioner
35th Floor, 400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6577 or 568-6538

*Counsel of Record

QUESTION PRESENTED FOR REVIEW

Whether the district court abused its discretion when, on the government's motion, it rescinded its order allowing withdrawal of Petitioner's guilty plea where: (1) the government's Motion To Reconsider Allowing Defendant to Withdraw a Plea of Guilty was filed late under the Local Court Rule governing reconsideration of orders; (2) the government's motion failed to show that the order had been entered by "mistake," as required by the case law, or by "palpable defect," as required by said Local Court Rule; and (3) the district court was aware of the existence of newly discovered evidence which, if introduced at trial, would tend to prove the Petitioner's innocence of the crime to which he pled guilty.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	(i)
TABLE OF CONTENTS	(ii)
APPENDIX TABLE OF CONTENTS	(iii)
TABLE OF AUTHORITIES	(iv)
OPINIONS BELOW	1
JURISDICTION	1
COURT RULE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	
I. The Decision Of The Sixth Circuit Misconstrues And Misapplies the Third Circuit Case Of *United States v. Jerry*	5
A. *Jerry* Does Not Authorize Recission Of An Order: (1) In Contravention Of The Procedure Set By Local Rule For Reconsideration Of Orders; Or (2) Where The Order Sought To Be Rescinded Was Neither A "Mistake" Nor An "Erroneous Interlocutory Order"	6
B. The Instant Case Is Factually And Procedurally Distinguishable From *U.S. v. Jerry*	8
II: The District Court Abused Its Discretion In Rescinding Its Order Allowing Withdrawal Of Petitioner's Guilty Plea When It Was Aware Of Newly Discovered Evidence Tending To Prove Petitioner's Innocence	11
III: In Light Of Additional Evidence Of Petitioner's Innocence, Discovered Since The Sixth Circuit's August 26, 1983 Opinion And Order, Petitioner Should Be Allowed To Withdraw His Plea Of Guilty And Be Tried On The Charges	12
CONCLUSION	13

APPENDIX TABLE OF CONTENTS

		Page
1.	August 26, 1983 Opinion of U.S. Court of Appeals for the Sixth Circuit	1a
2.	February 28, 1983 Opinion and Order of U.S. Court of Appeals for the Sixth Circuit	7a
3.	February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing)	12a
4.	August 26, 1983 Notice of Entry of Judgment of U.S. Court of Appeals for the Sixth Circuit	26a
5.	February 17, 1982 Order of U.S. District Court for the Eastern District of Michigan	27a
6.	February 10, 1982 Discussion of Newly Discovered Evidence (Excerpt of Transcript of Hearing)	29a

TABLE OF AUTHORITIES

Page

Cases

Boykin v. Alabama, 395 U.S. 238 (1969) 12

Kercheval v. United States, 274 U.S. 220 (1927) 12, 13

United States v. Farrah, 715 F.2d 1097 (6th Cir. 1983) 1, 5, 6

United States v. Green, 414 F.2d 1174 (D.C. Cir. 1969) 9

United States v. Jerry, 487 F.2d 600 (3rd Cir. 1973) 5, 6, 7, 8, 9, 10, 11, 13

United States v. LoRusso, 695 F.2d 45 (2d Cir. 1982) 9

Statutes

18 U.S.C. §4205(f) 3

26 U.S.C. §7206(1) 2, 3, 12

26 U.S.C. §7206(2) 2, 12

28 U.S.C. §1254(1) 1

28 U.S.C. §2071 7

Court Rules

Rule 83, Federal Rules of Civil Procedure 7

Rule 57, Federal Rules of Criminal Procedure 5, 7

Rule 1b, Local Rules of the United States District Court for the Eastern District of Michigan 7

Rule 17k, Local Rules of the United States District Court for the Eastern District of Michigan 2, 3, 4, 7

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, entered on August 26, 1983 and reported at 715 F.2d 1097, is set forth at Appendix 1a. The Opinion and Order of the United States Court of Appeals for the Sixth Circuit, filed on February 28, 1983, is set forth at Appendix 7a. The Opinion of the United States District Court for the Eastern District of Michigan, delivered February 10, 1982, is set forth at Appendix 12a.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on August 26, 1983. A timely Petition for Rehearing *en banc* was denied on November 30, 1983. This Petition for Writ of Certiorari was filed within sixty (60) days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

COURT RULE INVOLVED

Rule 17k of the Local Rules of the United States District Court for the Eastern District of Michigan:

> Motions to Alter or Amend a Judgment or for Rehearing or Reconsideration.
>
> 1. Time.
>
> Any motion to alter or amend a judgment and any motion for rehearing or reconsideration shall be served not later than 10 days after entry of such judgment or order.
>
> 2. No Response and No Hearing Allowed.
>
> No response to the motion and no oral argument thereon shall be allowed unless the Court, after filing of the motion, otherwise directs.
>
> 3. Grounds.
>
> Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, will not be granted. The movant must not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

STATEMENT OF THE CASE

On April 14, 1981, William Farrah (hereinafter "Petitioner" or "Farrah") was indicted by a United States grand jury in the Eastern District of Michigan and charged with two counts of violating 26 U.S.C. §7206(1), for allegedly subscribing to false and fraudulent tax returns, and one count of violating 26 U.S.C. §7206(2), for allegedly aiding and assisting in the preparation of a false and fraudulent corporate tax return.

On August 13, 1981, pursuant to an oral plea bargain in which the government agreed to dismiss two counts of the indictment, Farrah pled guilty to one count of violating 26 U.S.C. §7206(1). The district court accepted the plea and scheduled sentencing under the provisions of 18 U.S.C. §4205(f), for October 6, 1981.

On the date set for sentencing, however, the court allowed Farrah to withdraw his guilty plea because of a misunderstanding between the parties about the sentence to be imposed under the statute. Farrah and his counsel understood, based on statements by the supervisory probation officer, that Farrah would be sentenced to no more than four months in prison. The U.S. Attorney did not share this understanding.

On October 20, 1981, following two weeks of meetings among the U.S. Attorney on the case, Farrah, Farrah's counsel, the U.S. Attorney in charge of the Strike Force and an F.B.I. Special Agent with whom Farrah had once cooperated, the parties presented a written plea agreement to the trial court. This agreement also provided for dismissal of two counts of the indictment and for sentencing pursuant to 18 U.S.C. §4205(f).

The plea was accepted but, when the court sentenced Farrah to imprisonment for one year, Farrah immediately moved to withdraw his plea. He had been led to believe, he informed the court, that he would have to serve only four months, and that eight months of the one-year sentence would be suspended. The U.S. Attorney was present when Farrah moved to withdraw his guilty plea, but stood by and made no objection to the oral motion. The trial court entered the order of withdrawal on its docket.

On November 10, 1981, 21 days after entry of the withdrawal order, the government filed a Motion to Reconsider Allowing Defendant to Withdraw a Plea of Guilty and asked the trial court to conduct an evidentiary hearing on the motion. Although the motion was made 11 days later than the ten days permitted by Rule 17k of the Local Rules of the United States District Court for the

Eastern District of Michigan (hereinafter, "Local Rule 17k"), the court granted the Motion.

On January 27, 1982, the evidentiary hearing was held. At that hearing, the testimony of Farrah, his two former attorneys, the F.B.I. Special Agent and the supervisory probation officer depicted a serious communication gap among the participants in the plea bargaining process concerning the amount of time Farrah would have to serve in prison upon conviction.

The hearing was adjourned to February 10, 1982 for oral argument. Before the arguments commenced, the court and counsel discussed whether newly discovered evidence of Farrah's innocence, alleged in his November 20, 1981 Response to the government's motion, would be introduced at the hearing. Farrah's counsel informed the court that he had disclosed the existence of the evidence to assist the court in deciding the motion, that Petitioner would rely on this and other evidence in presenting his defense to a jury, but that he would not introduce the evidence at that hearing. Transcript excerpt, (Appendix 31a). The court acknowledged that the new evidence, "is only something to be raised at trial," adding, "I don't really think it has anything to do with the motion before the Court." (Transcript excerpt, Appendix 31a).

At the conclusion of the hearing, the court granted the government's motion and reinstated the guilty plea. (Transcript of Oral Opinion, Appendix 24a). A written order to this effect was entered on February 17, 1982 (Appendix 27a) and, on that date, Farrah was sentenced to imprisonment for a period of six months. He has been free on bond pending appeal.

On August 4, 1982, Farrah filed in the United States Court of Appeals for the Sixth Circuit his Brief on Appeal from the Order reinstating the guilty plea and from his judgment of conviction.

On February 28, 1983, the Sixth Circuit entered an Order vacating the judgment of conviction and remanded

the case to the district court for further proceedings on the ground that it had not found "any authority which would permit the district judge to reconsider this order (allowing withdrawal of the plea) and reinstate Farrah's guilty plea." (February 28, 1983 Opinion and Order, Appendix 11a).

On August 26, 1983, on rehearing, the Court of Appeals for the Sixth Circuit issued its Opinion and Order vacating its February 28, 1983 Order and affirming the judgment of conviction. (August 26, 1983 Opinion and Order, Appendix 6a).

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Sixth Circuit Misconstrues And Misapplies The Third Circuit Case Of *United States v. Jerry.*

The Sixth Circuit's August 26, 1983 Opinion on rehearing, which finds that the trial court did have authority to rescind its order allowing petitioner to withdraw his guilty plea, purports to adopt and apply the rationale of the Court of Appeals for the Third Circuit in *U.S. v. Jerry*, 487 F.2d 600 (1973), *United States v. Farrah*, 715 F.2d 1097, 1098 (6th Cir. 1983).

The Sixth Circuit cited with approval and relied upon the following language in *Jerry* to find such authority:

> The Federal Rules of Criminal Procedure, 18 U.S.C. ... make no provision for rehearing and modifying or setting aside an order entered through mistake. Does the absence of this power from the Rules, which 'were intended to constitute a comprehensive procedural code for criminal cases in Federal courts,' preclude its existence? We think not. F.R. Crim. P. 57(b) provides: 'If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.'

> Nothing in the Rules limits the power of the court to correct mistakes made in its handling of a case so long as the court's jurisdiction continues, i.e., until the entry of judgment. In short, the power to grant relief from erroneous interlocutory orders, exercised in justice and good conscience, has long been recognized as within the plenary power of courts until entry of final judgment and is not inconsistent with any of the Rules.

487 F.2d at 604 (footnote omitted), quoted at 715 F.2d 1099. The Sixth Circuit failed, however, to recognize or apply the limits discussed in *Jerry* on the power of the district court to revisit an order, and to observe that the facts in this case make *Jerry* totally inapplicable.

A. *Jerry* Does Not Authorize Recission Of An Order: (1) In Contravention Of The Procedure Set By Local Rule For Reconsideration Of Orders; Or (2) Where The Order Sought To Be Rescinded Was Neither "A Mistake" Nor An "Erroneous Interlocutory Order."

Contrary to the Sixth Circuit's construction of the *Jerry* case, it does not authorize a district court, without limitation, to reconsider an order permitting a defendant to withdraw his guilty plea. Rather, the language of *Jerry* quoted by the Sixth Circuit expressly limits that power.

Jerry provides that the plenary power of a district court to proceed in any lawful manner may be exercised only "if no procedure is specifically prescribed by rule." *Id.* at 604. Further, the court's power is limited to "correct(ing) mistakes made in its handling of a case," and "grant(ing) relief from erroneous interlocutory orders." *Id.* In this case, where *there was a procedure "specifically prescribed by rule"* for the reconsideration of orders, and there was no showing that the order allowing withdrawal of the plea was either "a mistake" or an "erroneous interlocutory order," *U.S. v. Jerry* does not support the trial court's recission of that order.

1. Local Rule 17k prescribed A Specific Procedure For The Reconsideration Of An Order.

The Sixth Circuit erroneously failed to recognize that, unlike the district court in *Jerry*, which apparently had no local rule "provi(ding) for rehearing and modifying or setting aside an order entered through mistake," *Id*, the district court in this case had such a rule.[1] The Sixth Circuit should have found that because Local Rule 17k of the Eastern District of Michigan specifically prescribed a procedure for the exercise by the district court of its power to reconsider orders, the court here was authorized to rescind its order allowing withdrawal of Petitioner's guilty plea *only as permitted by the terms of Local Rule 17k.*

Under that standard, the district court's recission of the order was a clear abuse of discretion because the requirements of the Local Rule were not met. The government's Motion to Reconsider Allowing Defendant to Withdraw a Plea of Guilty was filed twenty-one (21) days after the order was entered, not within ten (10) days, as required by Local Rule 17k.1. Moreover, even if the motion had been timely filed, it failed to show "a palpable defect" in the granting of the order permitting withdrawal of the plea, as required by Local Rule 17k.3. Because it failed to comply with the Local Rule, the government's motion should not even have been heard, much less granted.

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1 The Local Rules of the United States District Court for the Eastern District of Michigan were "promulgated pursuant to 28 U.S.C. §2071, Rule 83 of the Federal Rules of Civil Procedure and Rule 57 of the Federal Rules of Criminal Procedure." Local Rule 1b. Thus, the procedure set forth in Local Rule 17k is precisely the type of procedure which the Third Circuit anticipated when it prefaced its discussion of the district court's power to recind the order in *Jerry* with a quotation of F.R.Crim.P. 57(b), i.e., "If no procedure is specifically prescribed by rule. . . ." 487 F.2d at 604.

2. There Was No Showing That The Order Rescinded Had Been a "Mistake."

Even if there had been no Local Rule limiting the conditions in which the district court is authorized to rescind its orders, the district court's recission of the order allowing withdrawal of Farrah's guilty plea would have been an abuse of discretion under *Jerry*. That is, since Jerry provides that the power of the court may be exercised "to correct a mistake" or "to grant relief from erroneous interlocutory orders," that power should not have been exercised in this case unless there were such a mistake or erroneous order. As is noted above, however, the government made no showing in support of its Motion to Reconsider that the order was the result of "mistake" or "error". Under *Jerry*, therefore, recission of the order was not warranted and the Court of Appeals erred in holding to the contrary.

Because it ignored the limitations set forth in *Jerry* on the power of a district court to rescind its orders, and because those limitations are present in this case, the Court of Appeals for the Sixth Circuit erred: (1) in applying *U.S. v Jerry* to govern this case, and (2) in concluding that the trial court did not abuse its discretion in rescinding its order permitting Petitioner to withdraw his guilty plea. Because of these errors, the judgment of the Court of Appeals should be reversed.

B. The Instant Case Is Factually And Procedurally Distinguishable From *U.S. v. Jerry*.

1. The Order Withdrawing The Plea Was Defective In *Jerry*, Whereas, In This Case, The Order Permitting Withdrawal Of The Plea Was Proper.

The order withdrawing the guilty plea in *Jerry* was found to be defective for reasons which do not exist in Farrah's case: (1) the motion by defendant Jerry to withdraw

his guilty plea came months after the guilty plea was entered, not immediately, as in this case, and (2) the April 27, 1972 order allowing Jerry to withdraw his guilty plea was entered without notice to the government, *Id.* at 605, while here, the government was present at the hearing but declined to object. Moreover, the government's motion for reconsideration of the order withdrawing the plea was timely filed in *Jerry,* i.e., one day after the order was entered, *Id.* at 602-603, while here the government's Motion to Reconsider was not filed for twenty-one days after entry of the order, or eleven days after the deadline imposed by Local Rule.[2]

Thus, the district court in *Jerry* found, on the government's motion for reconsideration, that its order allowing withdrawal of Jerry's plea had been "improvidently" entered, *Id.* at 606, and rescinded it. The Court of Appeals for the Third Circuit affirmed the trial court: the order permitting withdrawal of the plea had been entered by "mistake" because it had been granted without affording the government notice or opportunity to be heard. *Id.* at 605.[3]

---

2 Compare the government's "immediate" motion in *United States v. LoRusso,* 695 F.2d 45, 50 (2d. Cir. 1982), *cert. denied,* _____ U.S. _____, 103 S.Ct. 1525 (1983), cited by the Sixth Circuit as a case in which the "district court had power to rescind order dismissing one count of indictment". August 26, 1983 Opinion, p. 5, 715 F.2d. at 1099. There, the district court had orally granted defendants' motions for judgments of acquittal, but no judgments of acquittal had been entered. The government's "immediate" motion to charge a lesser-included offense could thus properly be granted because the court's oral ruling was "no more than an interlocutory order." 695 F.2d at 52.

3 Similarly, in *United States v. Green,* 414 F.2d 1174 (1969), cited by the Sixth Circuit as a case in which the "trial judge had authority to withdraw oral ruling granting defense motion to dismiss indictment," August 26, 1983 Opinnion, p. 5, 715 F.2d at 1099, it is clear that the *reason* the ruling was withdrawn was that "the Goverment objected that it had not been given an opportunity to argue the question." 414 F.2d at 1175. That is, the ruling had been entered by "mistake."

In contrast to *Jerry*, there was no finding (nor any basis for a finding) that the order permitting withdrawal of Petitioner Farrah's guilty plea was "entered through mistake." As discussed above, this fact not only distinguishes *Jerry* from this case; it demonstrates that the district court here was not authorized, under the reasoning of *Jerry*, to rescind its earlier order and that the Sixth Circuit erred in affirming that recission.

2. While The Government Would Have Been Prejudiced By Withdrawal Of The Plea In Jerry, No Prejudice Would Result Here.

The Third Circuit found a reason, in addition to the defect in the order of withdrawal, for approving the trial court's reconsideration of the order in *Jerry*. The additional ground was that, in the several-month interval between Jerry's guilty plea and his withdrawal of the plea, the government had destroyed its evidence against him. *Id.* at 610. Thus, the court found, the government would have been severely prejudiced in any subsequent trial of Jerry. In this case, by contrast, the government made no allegation or showing that it had been prejudiced by the Petitioner's withdrawal of his quilty plea or that it would be prejudiced if the case were to proceed to trial.

3. Petitioner Farrah Discovered New Evidence Of His Innocence After Withdrawing His Plea; Jerry Had No New Evidence Of Innocence.

In *Jerry*, when the defendant moved to withdraw his guilty plea, he had no new evidence of his innocence to support his motion. Petitioner Farrah, on the other hand, did discover such evidence after he withdrew his plea. His counsel brought this discovery to the attention of the trial court both in the defendant's November 20, 1981 written Response To Government's Motion to Reconsider Allowing Defendant to Withdraw a Plea of Guilty and in the February

10, 1982 oral argument. The existence of such evidence in this case not only distinguishes it from *Jerry* but provides all the more reason why Farrah should have been allowed to withdraw his guilty plea and go to trial on the government's charges.

The factual differences between *Jerry* and the instant case discussed above demonstrate that, notwithstanding the superficial similarity between the two cases, neither the holding nor the reasoning of *Jerry* applies here. Because the inapplicable case of *United States v Jerry* (and two other similarly distinguishable cases) were the only authority on which the Sixth Circuit relied in affirming the district court, that affirmance was erroneous and should be reversed by this Court.

II. The District Court Abused Its Discretion In Rescinding Its Order Allowing Withdrawal Of Petitioner's Guilty Plea When It Was Aware Of Newly Discovered Evidence Tending To Prove Petitioner's Innocence.

The criminal charges against Farrah were based in part on the government's allegation that he received payments from his corporation which he never reported as personal income. Farrah maintained that the payments were loans and believed that, in fact, he had repaid them. Specifically, Farrah recalled repaying $32,000 to Sterling Screw Products through Mr. Kim Nuyen, who, in 1974 and 1975, was running the company. He could not, however, substantiate his belief with any records.

On November 9, 1981, however, after pleading guilty and then withdrawing his plea, Farrah discovered documents which substantiated his recollection that he repaid the loans. These documents had been, until Farrah agreed to plead guilty, in the custody of the government. They included a ledger sheet showing a deposit of $32,000 made "to the open account for S.S.P. (Sterling Screw Products) under the name of Kim Nuyen."

As noted above, the trial court was made aware of this new evidence both in a written argument filed on November 20, 1981 and in oral argument on February 10, 1982 (Appendix, 29a). The court did not believe, however, that the issue of the new evidence had "anything to do with the motion (to reconsider allowing defendant to withdraw a plea of guilty) before the Court." (Appendix, 31a).

Its decision to reinstate Farrah's guilty plea notwithstanding its awareness of this previously unavailable evidence was an abuse of the trial court's discretion. It was also a blatant disregard of this Court's admonition that a circumstance in which imprisonment is at stake "demands the utmost solicitude of which the courts are capable in canvassing the matter with the accused. . . ." *Boykin v. Alabama*, 395 U.S. 238, 243 244 (1969).

III. In Light Of Additional Evidence Of Petitioner's Innocence, Discovered Since The Sixth Circuit's August 26, 1983 Opinion And Order, Petitioner Should Be Allowed To Withdraw His Plea of Guilty And Be Tried On The Charges.

On November 25, 1983, in a consolidated civil action pending in the Eastern District of Michigan, the deposition of Michael Diponio, Farrah's bookkeeper, was taken. (*Hoffman v United States of America v William J. Farrah*, No. 82-71599 and *Hoffman v United States of America v William J. Farrah and Kenneth McClintock*, No. 81-71602). Mr. Diponio's earlier testimony before the grand jury had been significant evidence leading to Farrah's indictment for violation of 26 U.S.C. §7206(1) and §7206(2). Diponio's recent testimony concerning Farrah's knowledge of and involvement with the payroll tax obligations of his business dramatically differs from that given to the grand jury and casts substantial doubt on the charges against the Petitioner.

Even though this Court has held that withdrawal of a guilty plea "does not involve any question of guilt or innocence," *Kercheval v United States*, 274 U.S. 220, 224

(1927), a defendant's desire to prove his innocence is clearly a reasonable basis on which to allow him to withdraw his plea. In *Kercheval* this Court said:

> The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial *if for any reason the granting of the privilege seems fair and just.*

Id (Emphasis added). The increasing dubiousness of the charges against the Petitioner is a signficant reason why it would be fair and just to reverse the district court's reinstatement of his guilty plea and permit the Petitioner to defend himself at trial.

CONCLUSION

The power of the trial court to rescind an order permitting a defendant to withdraw his guilty plea is, in the Eastern District of Michigan, limited by Local Rule. Where the Court of Appeals affirms the recission of an order in contravention of that Rule and in the absence of a "mistake" in the order rescinded, the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision. The Sixth Circuit's misunderstanding of the rationale of *United States v. Jerry, supra*, and its misapplication of the holding of *Jerry* to the clearly distinguishable facts of this case must not be allowed to stand.

William Farrah has never been arrested for nor convicted of any criminal offense save the matter at bar. In light of this fact, and the existence of new evidence of the Petitioner's innocence, justice requires that Mr. Farrah be given the right afforded even the most hardened and recidivist criminal — the right to a trial. This Court should grant this Petition and reverse the Order of the Sixth Circuit.

Respectfully submitted,

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG

George N. Bashara, Jr.
Kathleen McCree Lewis*
Madelyn C. Law
Attorneys for Petitioner
35th Floor, 400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6577 or 568-6538

*Counsel of Record

Dated: January 20, 1984

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APPENDIX

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GOODNOW & TRIGG
George N. Bashara, Jr.
Kathleen McCree Lewis*
Madelyn C. Law
Attorneys for Petitioner
35th Floor, 400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6577 or 568-6538

*Counsel of Record

August 26, 1983 Opinion of U.S. Court of Appeals for the Sixth Circuit

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-1175

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. WILLIAM J. FARRAH, *Defendant-Appellant.*	ON APPEAL from the District Court for the Eastern District of Michigan.

Decided and Filed August 26, 1983.

Before: MARTIN and KRUPANSKY, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

PER CURIAM. This is an appeal from a judgment of conviction for subscribing to a false and fraudulent tax return, 26 U.S.C. § 7206(1), entered on defendant William Farrah's plea of guilty in the District Court for the Eastern District of Michigan.

A review of the proceedings below reveals that on April 14, 1981, Farrah was indicted by the grand jury for two counts of subscribing to a false income tax return and one count of aiding and assisting in the preparation of a false return. On August 13, 1981, pursuant to a plea agreement, the defendant pled guilty to Count II of the indictment. The plea

agreement, which was not reduced to writing, provided that, in exchange for the plea, the Government would move to dismiss the remaining Counts of the indictment. The agreement also provided that if the trial court deemed incarceration appropriate, the maximum duration of incarceration would be one year. Violation of § 7206(1) carries a maximum penalty of $5,000 and 3 years imprisonment. Finally, it was agreed that the sentence would be imposed in accordance with 18 U.S.C. § 4205(f), which provides:

> (f) Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of section 4164. This subsection shall not prevent delivery of any person released on parole to the authorities of any State otherwise entitled to his custody.

On October 6, 1981, the date of sentencing, it became apparent that there had been a misunderstanding concerning the maximum period of imprisonment. The defense was under the impression that the "one-third" provision of § 4205(f) would apply and therefore the maximum period of incarceration would be four months.

The Government contended that the agreement was framed with the understanding that the trial court *could* sentence the defendant for up to one year of imprisonment but that, *in its discretion*, the court could reduce that time to four months. The trial court, in light of the confusion, permitted the defendant to withdraw his guilty plea.

Following the October 6, 1981 hearing, further negotiations were undertaken between the Government and the defendant

in an effort to resolve a plea agreement. Farrah enlisted the aid of an FBI agent with whom Farrah had cooperated in a separate matter.

The FBI agent arranged a meeting on October 19, 1981 which was attended by the agent, Government counsel, the defendant and his attorney. The day following this meeting the parties again appeared before the district court and informed the court that a new plea agreement had been negotiated.

The parties presented a written agreement, signed by the defendant, and it was entered into the record. It provided, in pertinent parts; (A) the maximum term of imprisonment should not exceed one year, (B) the maximum fine imposed should not exceed $5,000 (C) Counts I and III were to be dismissed, and (D) the Government would advise the court of defendant's cooperation with the FBI but "will make no recommendation nor take any position regarding any sentence which the court may impose." The trial court inquired of defendant if any promises not included in the written agreement had been made to induce his plea and defendant reesponded in the negative.

Thereafter, the trial court imposed a sentence of one year's incarceration. Immediately after the imposition of this sentence the defendant informed the court that "everybody" had promised him that he would be incarcerated for a period of only four months. Following a colloquy between the court and defendant in which Farrah continuously asserted that he had been misled and that he desired a trial, the obviously and justifiably exasperated trial judge orally granted Farrah's request to withdraw his plea:

> THE COURT: All right, Mr. Farrah, your plea is withdrawn.
>
> THE DEFENDANT: Thank you, your Honor.
>
> THE COURT: I will enter an order to that effect and I will set this case down for trial.

THE DEFENDANT: Thank you, your Honor.
THE COURT: All right.

Although the judge did not enter a written order permitting the withdrawal of the plea, an entry was made in the docket indicating that defendant's guilty plea had been withdrawn, his sentence "set aside" and a trial date was to be scheduled.

Approximately two weeks subsequent to the aborted sentencing, the Government filed a motion requesting the district court to reconsider its order permitting the defendant to withdraw his plea of guilty. A hearing on this motion was conducted on January 27, and February 10, 1982.

At the conclusion of the February 10th session, the district court concluded that Farrah had been fully aware prior to entering his October 20th guilty plea that he faced a possible prison term of one year. The district court, thereupon, reversed its earlier ruling and reinstated Farrah's guilty plea. Thereafter, Farrah was sentenced to six months' imprisonment.

Initially, this Court was of the opinion that, in the absence of a Rule of Procedure permitting the lower court to rescind its order withdrawing the guilty plea, it was precluded from doing so. However, after further consideration, the Court now concludes that the position taken by the Third Circuit in *United States* v. *Jerry*, 487 F.2d 600 (3rd Cir. 1973), should be adopted.

In *Jerry*, as in the matter *sub judice*, the lower court entered an order permitting the defendant to withdraw a guilty plea. Subsequently, on motion of the Government, the district court recinded its order and, thereafter, refused to permit the defendant to withdraw his plea.

On appeal, the Third Circuit affirmed the conviction and specifically addressed the issue of the lower court's authority to vacate its initial order permitting the defendant to withdraw his plea:

> The Federal Rules of Criminal Procedure, 18 U.S.C., . . . make no provision for rehearing and modifying or setting aside an order entered through mistake. Does the absence of this power from the Rules, which "were intended to constitute a comprehensive procedural code for criminal cases in Federal courts," preclude its existence? We think not. F.R. Crim. P. 57(b) provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." Nothing in the Rules limits the power of the court to correct mistakes made in its handling of a case so long as the court's jurisdiction continues, i.e., until the entry of judgment. In short, the power to grant relief from erroneous interlocutory orders, exercised in justice and good conscience, has long been recognized as within the plenary power of courts until entry of final judgment and is not inconsistent with any of the Rules.

Id. at 604 (footnote omitted). *See also, United States* v. *LoRusso*, 695 F.2d 45 (2nd Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1525 (1983) (district court had power to rescind order dismissing one count of indictment); *United States* v. *Green*, 414 F.2d 1174 (D.C. Cir. 1969) (trial judge had authority to withdraw oral ruling granting defense motion to dismiss indictment). As indicated, the Court finds the reasoning espoused in *Jerry* persuasive.

Having concluded that the lower court possessed the authority to reconsider its order, the Court has no hesitation in further concluding that the trial court did not abuse its discretion in rescinding its order and refusing to permit the defendant to withdraw his plea. The record fully supports the trial judge's conclusion that Farrah completely understood the possible length of incarceration in connection with his plea. There is simply no basis for Farrah's post-sentence protestations to the contrary and the trial judge correctly concluded that Farrah's guilty plea should stand.

In accordance with the foregoing, the Court hereby grants the Government's petition for rehearing, vacates its earlier order and affirms the judgment of conviction.

February 28, 1983 Opinion and Order of U.S. Court of Appeals for the Sixth Circuit

No. 82-1175

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	
v.	ORDER
WILLIAM J. FARRAH, *Defendant-Appellant.*	

BEFORE: MARTIN and KRUPANSKY, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

This is an appeal from a judgment of conviction for subscribing to a false and fraudulent tax return, 26 U.S.C. §7206(1), entered on defendant William Farrah's plea of guilty in the District Court for the Eastern District of Michigan.

A review of the proceedings below reveals that on April 14, 1981, Farrah was indicted by the Grand Jury for two counts of subscribing to a false income tax return and one count of aiding and assisting in the preparation of a false return. On August 13, 1981, pursuant to a plea agreement, the defendant pled guilty to Count II of the indictment. The plea agreement, which was not reduced to writing, provided that, in exchange for the plea, the Government would move to dismiss the remaining Counts

of the indictment. The agreement also provided that if the trial court deemed incarceration appropriate, the maximum duration of incarceration would be one year. Violation of §7206(1) carries a maximum penalty of $5,000 and 3 years imprisonment. Finally, it was agreed that the sentence would be imposed in accordance with 18 U.S.C. §4205(f), which provides:

> (f) Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of section 4164. This subsection shall not prevent delivery of any person released on parole to the authorities of any State otherwise entitled to his custody.

On October 6, 1981, the date of sentencing, it became apparent that there had been a misunderstanding concerning the maximum period of imprisonment. The defense was under the impression that the "one-third" provision of §4205(f) would apply and therefore the maximum period of incarceration was four months.

The Government contended that the agreement was framed with the understanding that the trial court *could* sentence the defendant for up to one year of imprisonment but that, *in its discretion,* the court could reduce that time to four months. The trial court, in light of the confusion, permitted the defendant to withdraw his guilty plea.

February 28, 1983 Opinion and Order of U.S. Court of Appeals for the Sixth Circuit

Following the October 6, 1981 hearing, further negotiations were undertaken in an effort to resolve a plea agreement. Farrah enlisted the aid of an FBI agent for whom Farrah had cooperated in a separate matter.

The FBI agent arranged a meeting on October 19, 1981 which was attended by the agent, Government counsel and the defendant and his attorney. The day following this meeting the parties again appeared before the district court and informed the court that a new plea agreement had been negotiated.

The parties presented a written agreement, signed by the defendant, and it was entered into the record. It provided, in pertinent parts; (A) the maximum term of imprisonment should not exceed one year, (B) the maximum fine imposed should not exceed $5,000 (C) Counts I and III were to be dismissed, and (D) the Government would advise the court of defendant's cooperation with the FBI but "will make no recommendation nor take any position regarding any sentence which the court may impose." The trial court inquired of defendant if any promises not included in the written agreement had been made to induce his plea and defendant responded in the negative.

Thereafter, the trial court imposed a sentence of one year's incarceration. Immediately after the imposition of this sentence the defendant informed the court that "everybody" had promised him that he would be incarcerated for a period of only four months. Following a colloquy between the court and defendant in which Farrah continuously asserted that he had been misled and desired a trial, the obviously and justifiably exasperated trial judge orally granted Farrah's request to withdraw his plea:

> THE COURT: All right, Mr. Farrah, your plea is withdrawn.

THE DEFENDANT: Thank you, your Honor.

THE COURT: I will enter an order to that effect and I will set this case down for trial.

THE DEFENDANT: Thank you, your Honor.

THE COURT: All right.

Although the judge did not enter a written order permitting the withdrawal of the plea, an entry was made in the docket indicating that defendant's guilty plea had been withdrawn, his sentence "set aside" and a trial date to be set.

Approximately two weeks subsequent to the aborted sentencing, the Government filed a motion requesting the district court to reconsider its order permitting the defendant to withdraw his plea of guilty. A hearing on this motion was conducted on January 27, and February 10, 1982.

At the conclusion of the February 10th session, the district court concluded that Farrah had been fully aware prior to entering his October 20th guilty plea that he faced a possible prison term of one year. The district court, thereupon reversed its earlier ruling and reinstated Farrah's guilty plea. Thereafter, Farrah was sentenced to six months' imprisonment.

Initially, this Court would observe that the district court's conclusion that Farrah fully understood the possible length of incarceration in connection with his plea is fully supported by the record. Farrah's claims to the contrary represent nothing less than an attempt to breach a proper plea agreement. Were this the only issue before the Court, the case would scarcely deserve even brief comment.

However, the issue is not the voluntariness of the guilty plea. Rather, the issue addresses the authority of a district judge to reinstate a guilty plea it has previously permitted the defendant to withdraw.

The oral ruling of the court was reflected in the "criminal docket" and constituted an order of the court. *See*, Rule 55, Fed. R. Crim. P. 1/ This Court has not found any authority which would permit the district judge to reconsider this order and reinstate Farrah's guilty plea. Accordingly, the judgment of conviction is vacated and the matter remanded to the district court for further proceedings.

ENTERED BY ORDER OF THE COURT

/S/ JOHN P. HEHMAN
Clerk

1/ There is authority to the effect that a mere docket entry is not an order of the court *for the purpose of commencing the expiration of the time for appeal* if a formal judgment is later signed and entered. *See e.g. United States v. Lee*, 501 F.2d 890 (D.C. Cir. 1974). This authority is premised on the need to fix a *final* appealable order and does not apply to the instant matter.

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

THE COURT: All right.

This matter is before the Court on the government's motion to reconsider allowing the Defendant to withdraw his plea of guilty entered in this case of October 20, 1981.

William Farrah pled guilty to Count II of the three count indictment charging him with violating certain income tax laws of the United States on August 13, 1981 pursuant to an oral Rule 11 agreement.

The Rule 11 agreement, the oral Rule 11 agreement, pursuant to which the plea was entered on August 13, 1981 provided that the maximum sentence imposed would be "one year pursuant to the provision of 4205(f) Title 18, U.S. Code."

On October 6, 1981 the Defendant appeared for sentencing pursuant to that plea, under the oral Rule 11 agreement.

At the time Defendant's attorney indicated that Defendant's Counsel believed that by agreeing to a maximum sentence of one year, pursuant to Section 4305(F) Title 18, U.S. Code, the Defendant would be released on parole after serving one-third of his term.

The government's attorney stated that his understanding of the agreement and Section 4205(F) was that the Court had the discretion but not an obligation to provide for automatic parole at the time of sentencing. Defense Counsel immediately made an oral motion to withdraw the guilty plea which the Court granted with the concurrence and approval of the government.

An order permitting Defendant to withdraw his plea was not entered.

Farrah again appeared before the Court on October 20, 1981 which was two weeks after he was before the Court for sentencing on the original plea, and entered a

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

plea of guilty to Count II of the indictment. This time pursuant to a written Rule 11 agreement.

The Rule 11 agreement, the written Rule 11 agreement provided that the maximum term of imprisonment would not exceed one year and the fine imposed would not exceed $5,000.

Since the presentence report already had been prepared for the previous sentencing, the Court proceeded to sentence the Defendant on that same day, October 20th, 1981 to one year in custody of the Attorney General.

After receiving the sentence of the Court, the Defendant, Farrah, himself, addressed the Bench, claiming that he had been promised and led to believe, using those precise terms, that he would receive a split sentence and only have to serve four months in custody.

The defendant also asked permission of the Court to go to trial. The Court permitted him, in open court, gave him permission to withdraw his guilty plea.

Counsel for Defendant immediately moved to withdraw from representing the Defendant. That was Mr. Zuckerman, as I recall. At that time the Defendant had two attorneys, Lustig and Zuckerman. Zuckerman appeared before the Court here with the Defendant at that time in open court and Mr. Lustig was sitting in the courtroom but didn't stand up here beside the Defendant during this period of time.

I don't remember whether I have already said this. I have some notes here, that the Counsel for the Defendant, Zuckerman, I think, I think mentioned immediately moved to withdraw from representing the Defendant. The Court requested Zuckerman to submit a written motion. It subsequently was granted when the Defendant obtained new Counsel.

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

Neither a judgment or commitment order nor an order permitting the Defendant to withdraw his second guilty plea has ever been entered in this case.

On November 10, 1981 the government filed motion, now before the Court, to reconsider allowing Defendant to withdraw his guilty plea. The government requested an evidentiary hearing to develop the factual basis relied upon by Defendant in his motion to withdraw his plea. And an application to withdraw a guilty plea should not be decided solely on the unsworn testimony of the Defendant, see *U.S. v Meiner,* Third Circuit case, 383 Fed. 2nd 404.

"When the record shows that the movement is entitled to relief, the Court is not required to hold an evidentiary hearing". See *Scott v U.S.* 292 Fed. 2nd. 49, Circuit case decided in 1961.

However, Defendant in this case raised questions of fact which could not be resolved by reference to the record, and the Court concluded that an evidentiary hearing would be required to discover the circumstances surrounding the Defendant's guilty plea. See also *Sarrano v United States,* Fed. 2nd 707. Such an evidentiary hearing was conducted by this Court on January 27, 1982.

Rule 32(B) on the Federal Rules of Criminal Procedure provide as follows:

"A motion to withdraw —"

I think I am quoting it correctly, but I will get the Rule.

"A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence suspended but to correct manifest injustice, the Court, after sentence, may set aside, the judgment of conviction and permit the Defendant to withdraw his plea. The burden of establishing manifest injustice is on the Defendant". See *U.S. v Becklen,* 8th Circuit case Fed.

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

2nd. 1122; also the case of *U.S. v Tyler,* 2nd Circuit case record in 602 Fed. 2nd page 30; also case of *Myles v U.S.,* 10th Circuit case record in 385 Fed. 2nd 541.

"A Defendant who has entered a guilty plea may not withdraw it as a matter of right". See *United States v Kirkland,* 8th Circuit case record in 578 Fed 2nd 170.

"The District Judge has wide discretion in deciding whether to permit a Defendant to withdraw a guilty plea. See *U.S. v Arabia,* another 6th Circuit case record in 512 Fed 2nd page 34. Also case of *Scott v United States,* which I have already cited, at page 51.

"Rule 32(D) imposes no limitation on withdrawing a guilty plea prior to sentencing". And by some courts is held it is freely allowed. For instance, 4th Circuit case *United States v Roland,* 318 Fed 2nd 406. And 9th Circuit, *Kadwell v United States,* 315 Fed 2nd. 667.

"However, permission to withdraw a guilty plea after sentencing is granted only in extra-ordinary cases when the Defendant has made the requisite showing of manifest injustice". 9th Circuit, *Caldwell* sets forth some of the reasoning underlying this distinction, and I quote from that case:

"This distinction rests upon practical consideration important to the proper administration of justice. Before sentencing, the inconvenience to Court and Prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the rights of the accused to trial by jury, but if a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment and withdraw the plea if the sentence were unexpectedly severe. The result would be to undermine respect for the Court and fritter away the time and painstaking efforts devoted to the sentencing process".

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

That is quoted from *McCall* case at page 670.

And also in the 3rd Circuit case of *U.S. v Crusco* recorded 532 Fed. 2nd 21, the Court noted that cases of design but unfounded expectations must be carefully distinguished from those in which the Defendant's expectations as to the sentence are predicated upon promises by the government or statements from the Court. Disappointment with the sentence imposed is not grounds for a motion to withdraw a guilty plea ". See *Myles v U.S.*, which I have already referred to.

Defendant testified at the hearing of this motion that prior to the October 6th, 1981 sentencing, his lawyer told him that the maximum custodial sentence he could receive under the Rule 11 agreement was four months.

This testimony corresponds with the assertions of Defense Counsel made at the October 6th sentencing that he understood the Section 4205(F) require the Court to permit Defendant to be released as on parole, after serving one-third of the sentence. It appears therefore, that Defendant's Counsel thought that they had agreed to a maximum custodial sentence of four months in the Rule, oral Rule 11 agreement, that Defendant pled guilty to under, pled guilty to on August 13, 1981.

And the Court, at that time, with the consent and the concerns of the government, as I recall, granted that motion to withdraw, in view of the misunderstanding or the misrepresentation rather of the attorneys of the government and Defense Counsel as to the meaning of 4205(F).

However, the first guilty plea was withdrawn with the Court's permission, as I have already mentioned, on October the 6th, when it became apparent that the government's understanding of the oral Rule 11 was not the same as Defendant's.

This misunderstanding came to light in a rather unusual manner. As is customary in this district, the Court

discussed its sentencing alternatives and considerations with the members of the probation department in chambers immediately prior to the sentencing.

At the hearing on this motion the probation officer testified that one subject of his discussion was whether under Section 4205(F) the Court was required to provide that the Defendant be released as on parole after one-third of his term or whether to so provide was in the Court's discretion. The probation officer advised the Court that he understood that to so provide was discretionary.

The probation officer left the Court's chambers, according to his testimony, and testified that he approached the lawyers for the Defendant and the government, indicating that the Court had requested him to ask them what their understanding of Section 4205(F) was. When the disagreement over whether the release on parole provision was mandatory or it became evident, the probation officer testified that he told the party that the Court wanted to know if the agreement was that Defendant would only serve four months in custody, whether the party would consider a split sentence with custody not to exceed one-third of the one year sentence. He states also that that the government and Defense Counsel agreed to such a position but Defense Counsel wanted to check with his client.

Before proceeding with further recitation of the events of October 6th the Court notes that at no time did this Court request the probation officer to make any such inquires of Defense Counsel and the government Counsel.

This Court does not participate in the plea bargaining process and has no right to do so. Presumably the probation officer misunderstood the thrust of the discussion of the Defendant's sentencing held with the Court in chambers. As a matter of fact, my only concern at that time was whether Section 4205(F) was whether I had the authority to place the Defendant on probation under 4205(F). That was my only concern.

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

And I felt, in my own mind, that I didn't have the authority, because I have also understood probation to be a sort of custody sentence. He is in technical custody of the Court until the probation has been terminated, and therefore my only concern at that time was not whether 4205(F) required a mandatory, gave the Court an option to impose on a fixed term or release him, or rather, yes, release him as if on parole. That is the language of the statute, after serving a third of his term.

Now why the statute uses that precise language, I don't know, but I think, I believe I know; that sentence of one year is not eligible for parole. So I think, to avoid that conflict, the congress has used the expression "release as if on parole", rather than take place upon parole, you would have an inconsistency in the statute.

But anyway, that was my only concern. I did not ask the probation officer to consult with either the government or the Defendant or his attorney as to whether they would be agreeable to the sentence. I have never, never done it and I don't intend to do it any time in the future.

In any event, immediately after the discussion between the probation officer and the attorneys, the Court was called into session. The misunderstanding between the lawyers regarding the terms of the Rule 11 agreement, that is the oral Rule 11 agreement became known to the Court and Defendant was permitted to withdraw his plea of guilty as I have previously mentioned.

The Defendant's Counsel testified that after sentencing was adjourned, he met in the hallway with the probation officer and the government's attorney.

He stated that the probation officer told him that the Court was "inclined" to give Defendant a split sentence, and asked Counsel if they wanted to proceed with the sentencing that day. Defense Counsel told the probation officer

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

that his client did not want to go forward that day. He then met with his client, advised him that the Judge was considering giving him a split sentence. After Defendant withdrew his plea of guilty on October 6th further plea negotiations took place, according to the testimony. Defendant has retained two attorneys, Richard Lustig, the attorney who had appeared with the Defendant at all hearings in this matter to date, testified that he had a conference with Mr. Newcomer, the government Counsel, and Mr. Marcus, Mr. Newcomer's superior, regarding the possibility of work release. The government would not agree to work release. And Lustig told Farrah, according to his testimony, that the government would not agree to a plea agreement of less than one year.

Lustig withdrew from the plea negotiations as of October 7th or October 8th but Farrah kept him informed about the further negotiations by frequent telephone calls.

Farrah's other attorney, Richard Zuckerman, conducted the subsequent plea bargaining on Farrah's behalf. And I want to say now, that both Mr. Lustig and Mr. Zuckerman are able, experienced lawyers. Both of them have had a great deal of experience, especially in criminal cases. I have had them both before this Court and they both are very able attorneys, as is Mr. Richards. I am not saying this to draw any contrasts. Mr. Richards is also a very able, reputable attorney, because he has been before the Court many times over the years.

Zuckerman testified that he arranged a meeting with the government's attorney's at Farrah's request, to discuss the possibility of a plea agreement of less than one year maximum sentence.

This meeting was held on October 19, 1981. Present were Farrah, Zuckerman, Newcomer, Marcus and John Anthony, an FBI Agent, who had prior contact with Farrah and who attended the meeting at Farrah's request.

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

The Court notes that Anthony testified that the October 19th meeting was arranged at his request. The identify (sic) of the person who arranged that meeting is immaterial. Both Anthony and Zuckerman testified that the government attorneys made their position regarding the maximum term to which they will agree to permit the Defendant to plead.

Marcus stated repeatedly that the government would not agree to a maximum sentence of less than one year. Furthermore, Zuckerman stated that Marcus told Defendant that the Judge would decide whether he would actually be sentenced to less than a year. Anthony's testimony supports Zuckerman's in that respect.

Zuckerman also testified that after his meeting with Newcomer and Marcus, that it was made clear to the Defendant that the government would not agree to a Rule 11 agreement of less than one year maximum sentence.

On October 20, 1981 Farrah signed a Rule 11 agreement in which he agreed to plead guilty to Count II of the indictment. The agreement specified that the maximum term of imprisonment would not exceed one year and that the maximum fine imposed would not exceed $5,000.

On that date, October 20th, Farrah, his wife, Zuckerman and Anthony met for lunch, prior to the time scheduled for Defendant to enter his guilty plea, according to the testimony. Zuckerman testified that he told Farrah to be prepared to be sentenced to a year custody. And after they testified, as I recall it, that he told Farrah, either Anthony or Zuckerman or both, that he told Farrah and his wife that they should not go into the courtroom expecting to be sentenced less than one year.

At the scheduled hearing the Court again questioned Farrah thoroughly as it had when accepting his previous guilty plea on August 13, 1981 regarding the voluntariness and factual basis for his plea.

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

Farrah stated that he understood the contents of plea agreement and pled guilty freely and voluntarily to Count II. The Court specifically inquired of the Defendant as follows: "I want to be absolutely sure now no one has informed you what sentence the Court will actually impose in this matter if I accepted your plea, other than that sentence will not exceed one year in prison and a fine of not to exceed $5,000; has anyone told you what sentence the Court would impose?"

"The Defendant: No, your Honor."

Then after receiving the one year custody sentence involved in this case on that date, that is October 20th, Farrah moved pro per to withdraw with plea, claiming he was promised and led to believe that sentence would be four months in custody.

At the evidentiary hearing on the instant motion, Farrah testified he understood he could be sentenced up to a year in custody under the October 20th Rule 11 agreement. He stated that he was sure that the Judge would not sentence him to more than four months because of a previous conversation his lawyer had with the probation officer. He stated that he thought that the Judge would not have changed his mind since October 6th and would sentence him to only four months in custody. He was "shocked" when the Judge sentenced him to the maximum term.

Now, again I want to repeat that this occurred two weeks after the October 6th incident when the Defendant was before the Court for sentencing according to his, I think his plea entered August 13 under an oral Rule 11 agreement pursuant to Section 4205(F) which did contain a provision for release of the Defendant as if on parole after serving a third of the term, if the Court should decide to impose that provision or invoke rather, that provision.

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

I don't think it is necessary that I quote that section of Section 4205(F) but clearly, the interpretation that the government had of that provision at the time the dispute arose between the government and Defense Counsel on October the 6th, as I see it, the government's interpretation of that, of whether it was mandatory to release the Defendant after serving a third of his term or whether that gave the Court an option, whether the government's interpretation was correct, and I haven't heard that challenged.

Now I want to also say that when the Defendant requested of the Court, the right to withdraw his plea of guilty after receiving a one year sentence on October 20th, the Court did say he would grant that motion or that request.

After the sentence was imposed and at the close of that court sesson (sic) session, Mr. Zuckerman, as I have already mentioned, moved to withdraw as Defendant's attorney. Mr. Zuckerman addressed the Court as follows: "Your Honor, I would like to apologize in the first instance. This is a shock to me and I am not good at theatrics, so I hope that you will understand that it is truly a surprise to me both what has transpired and what has represented; would the Court entertain a motion to withdraw? Would you like it in writing or would you like it orally?"

"The Court: A motion by Mr. Zuckerman to withdraw as counsel of record, I said you better do it in writing," which was done, and the motion was later granted.

Now, up until the time I had intended to finalize my granting of the Defendant's request to withdraw his plea of guilty, relying on what the Defendant told the Court and accepting his statement as being true. But when Mr. Zuckerman informed the Court at the close of that session that he wanted to withdraw, that created a suspicion in my mind that maybe Mr. Farrah's statement was not correct. And for that reaon I did not finalize the order allowing him to withdraw his plea.

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

As a matter of fact, I had intended to finalize that by an order, as the record will clearly indicate.

On page 5 of the transcript of that proceeding, after I had given — I told Mr. Farrah that he could withdraw his plea and I stated I will enter an order to that effect. And I also set this case down for trial.

I never entered that order. And the reason I didn't is because I had misgivings about Mr. Farrah's representations to the Court, that he was led to believe. And led to believe, I don't think he specified who led him to believe but the inference I had was his attorneys. At the close of the session, when Mr. Zuckerman asked permission to withdraw and telling the Court he was shocked by what occurred, that created a suspicion in my mind that Mr. Farrah was perhaps not giving me a correct statement.

So I let it go along. As a matter of fact, I said right on the record, "I just don't know what to do about this". And I think Mr. Newcomer, I looked at him, and he said well, he didn't know either. In other words, the Court was puzzled in view of what had occurred. With a few minutes before, Mr. Farrah had entered his plea and then had told the Court that no one had told him what the sentence of the Court would be; and then when Mr. Zuckerman asked permission to withdraw as his attorney, and I mulled this over in my mind, whether I should make a surray spontai (sic) motion to vacate whatever permission I granted in court. Then I received the government's motion. And it was much better, I guess, that the government issue arose that way. The government requested an evidentiary hearing, which i would grant in any event, and I did. I granted the hearing. I took testimony. And Mr. Richards had made the point that this motion doesn't compart (sic) with the local rule. But I want to again point out that no order was ever entered allowing the withdrawl and neither was the sentence finalized by the entry of a judgment or commitment.

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

In any event, this case is clearly one where the Defendants — where the Defendant — I mean singular — thoroughly understood the nature of his guilty plea, and the Court so finds, and the possible sentence that he was subjected to under the written Rule 11 agreement. But it appears to the Court that the Defendant was disappointed with the sentence he received was more than he had hoped for. His lawyers and the government lawyers repeatedly advised him that the plea agreement provided for a maximum one year custody and that the actual sentencing decision was that of the Court.

I repeat again, that he told the Court upon entering his guilty plea, that no one had advised him as to what the sentence would be. Indeed any conversations he or his Counsel had with the probation officer regarding his first guilty plea under the oral Rule 11 agreement under Section 4205(F), while the plea entered, which is the plea now before the Court for reconsideration of the withdrawal of the plea, was not under that section, it was a straight one year sentence.

In any event, afterwards, after that new plea negotiations were conducted and a new Rule 11 agreement was then entered into, as I mentioned several times.

The Court finds and concludes that the Defendant Farrah understood that he could be sentenced up to a year; his plea clearly was voluntary and this Court concludes that the Defendant will not be permitted to withdraw his plea of guilty, and although sentence has been previously imposed in this matter, I think perhaps, so as not to have a technical problem about sentencing, that the sentence that Defendant should be, the sentence should be imposed again following the denial of this or the granting of this motion to reconsider the withdrawl of the pleas.

February 10, 1982 Opinion of U.S. District Court for the Eastern District of Michigan (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215).

It is nearly 5:00 o'clock, and I can reimpose the sentence, because I don't want any more technicalities about what the Court is doing here. I did impose a sentence on October 20th but I did not finalize it, as I have already mentioned, by entering a written judgment and commitment.

MR. RICHARDS: Your Honor, may I be heard on the isssue of sentencing?

THE COURT: Yes.

MR. RICHARDS: As your Honor knows and has pointed out in his opinion, I am new Counsel representing Mr. Farrah and as new Counsel, I have not seen the presentence report and I don't know what it says and I would appreciate a chance to look at it.

THE COURT: I will give you that permission. You should be entitled to it.

I think I will set another date for sentencing and you will be given a copy of the presentence report.

I don't know what the present procedure is. They used to commit it the day of the sentencing, but I think that has been changed to given Counsel earlier —

MR. MILLER: It says in the report.

THE COURT: Whatever the present procedure is, you may have it.

MR. RICHARDS: Thank you.

THE COURT: And then we will schedule another date for sentencing or resentencing.

That's all. Appropriate orders should be submitted.

(Whereupon the above-entitled matter was recessed, to reconvene at a date to be set).

August 26, 1983 Notice of Entry of Judgment of U.S. Court of Appeals for the Sixth Circuit

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. POST OFFICE COURTHOUSE BUILDING
CINCINNATI OHIO 45202

JOHN P. HEHMAN
CLERK

TELEPHONE
(513) 684-2953
FTS 684-2953

August 26, 1983

Mr. George N. Bashara
Mr. John L. Newcomer

Re: Case Number 83-1175
United States of America, Plaintiff-Appellee, vs. William J. Farrah, Defendant-Appellant. District Court Number 81-80215

Dear Counsel:

The Court today announced its decision in the above-entitled case.

A copy of the Court's opinion is enclosed, and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Each party will bear its own costs on this appeal.

Very truly yours,

John P. Hehman, Clerk

/S/ Dorothy Phelan

By: (Mrs.) Dorothy Phelan
Deputy Clerk

February 17, 1982 Order of U.S. District Court for the Eastern District of Michigan.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 81-80215

WILLIAM FARRAH,
Defendant.
_____/

ORDER GRANTING MOTION TO RECONSIDER AND DENYING DEFENDANT'S REQUEST TO WITHDRAW PLEA OF GUILTY

At a session of said Court, held in
the Federal Building at Detroit, Michigan
on February 10, 1982

PRESENT: HONORABLE RALPH M. FREEMAN
United States District Court Judge

Upon motion of the United States of America to Reconsider Allowing the Defendant to Withdraw a Plea of Guilty entered on October 20, 1981, at which time sentence was imposed and the Defendant promptly moved for permission to withdraw the plea of guilty, and an evidentiary hearing having been held on January 27, 1982 upon the Government's Motion, and the Court having been fully advised in the premises and all issues having been duly considered;

IT IS HEREBY ORDERED that the Motion to Reconsider Allowing the Defendant to Withdraw a Plea of

February 17, 1982 Order of U.S. District Court for the Eastern District of Michigan.

Guilty is GRANTED and the Defendant's request for permission to withdraw his plea of guilty is HEREBY DENIED for reasons more fully stated at the session of the Court.

/S/ RALPH M. FREEMAN
RALPH M. FREEMAN
United States District Judge

Dated: 17 February, 1982

APPROVED AS TO FORM

/S/ WILLIAM J. RICHARDS
WILLIAM J. RICHARDS
Attorney for Defendant

February 10, 1982 Discussion of Newly Discovered Evidence (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215, U.S. District Court for the Eastern District of Michigan).

Detroit, Michigan

Wednesday, February 10, 1982

THE CLERK OF THE COURT: Case Number 81-80215, United States of America v William Farrah.

THE COURT: Good afternoon, gentlemen.

MR. NEWCOMER: Good afternoon, your Honor.

MR. RICHARDS: Good afternoon, your Honor.

THE COURT: This is your motion, isn't it?

MR. NEWCOMER: It is my motion, your Honor.

THE COURT: All right.

MR. NEWCOMER: Before I address myself to the Court, there are a few remarks that I would like to make in closing argument.

I would like to point out to the Court part of the Defendant's response to my notion (sic) to reconsider allowing the Defendant to withdraw his guilty plea included a statement to the effect that on November 9, 1981 the Defendant had discovered documents which substantiated his recollection that he had retained (sic) loans or it says, "the loans" in this case. And that Mr. Farrah has recalled repaying $32,000 to Sterling Screw Products through Mr. Kim Nuyen.

February 10, 1982 Discussion of Newly Discovered Evidence (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215, U.S. District Court for the Eastern District of Michigan).

Your Honor, there was no factual basis that was made at the evidentiary hearing that we had two weeks ago on this point. Partly that could have been because there was no time. On the other hand, I did ask Counsel whether or not he intended to press that point and he indicated to me at that time, now by saying this, I do not intend to foreclose him from pressing that point on his argument to whatever extent he desires to press it.

I would like to, at this point, bring, make closing arguments, ask on the record if the Defendant is still raising that as an issue in this, for the purposes of this motion, that there was new evidence.

THE COURT: I missed the first part down here. I was writing something else down here. What is it, the amount you mean?

MR. NEWCOMER: In the response that was filed by the Defendant to my motion, he claimed that on November 9, 1981 — this is found at page 4 of the Defendant's response.

THE COURT: All right.

MR. NEWCOMER: In fact, it is page 4 of his brief in support of it.

THE COURT: Oh, yes, about repaying the loan?

MR. NEWCOMER: Yes, sir. And when I asked Counsel about that the day we were here for the evidentiary hearing, he indicated to me, he told me that he wasn't planning to press that any further.

February 10, 1982 Discussion of Newly Discovered Evidence (Excerpt of Transcript of Hearing, United States v. Farrah, Case No. 81-80215, U.S. District Court for the Eastern District of Michigan).

THE COURT: I don't think it is really relevant to this hearing. I noticed the Defendant referred to this in connection with the response. I don't know what position the Defense is.

MR. NEWCOMER: I would like for him to state for the record. I don't think it is relevant either, but I think because he raised it as an issue, I think he is at least entitled to develop it if he desires to develop it.

THE COURT: Well, yes, I suppose so.

MR. RICHARDS: Well, your Honor, I will indicate now that I don't intend to present any evidence, any testimony with respect to this repayment of the loan.

I have disclosed for Counsel's benefit and for the Court's benefit, the business records on which the Defendant would rely in presenting this defense to a jury. This is not the full extent of the defense, of course.

The time to present that in full would be at a trial. But in answer to Mr. Newcomer's question, yes, we do still rely on this argument in support of the Defendant's position.

MR. NEWCOMER: All right. Then I think I should address myself to it.

THE COURT: Well, it is only something to be raised at trial. I don't really think it has anything to do with the motion before the Court.

The Defendant said they wouldn't waive it or abandon it if they go to trial.

I don't know. Maybe they want to argue it here, but we will see.

You can respond, if they do.